**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH, NEW DELHI** (THROUGH VIDEO CONFERENCING]

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER, AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

ITA No. 843/DEL/2021 [A.Y 2016-17]

| | | |
|---|---|---|
| M/s Shahi Exports Pvt. Ltd<br>F – 88, Okhla Industrial Area<br>Phase – 1, New Delhi | Vs. | The Addl.C.I.T<br>New Delhi |

PAN: AAJCS 1175 L

(Applicant) (Respondent)

Assessee By : Shri M.P. Rastogi, Adv
Shri Deepak Malik, Adv

Department By : Shri Mahesh Shah, CIT-DR

**Date of Hearing : 11.01.2022**
**Date of Pronouncement : 17.01.2022**

## ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 30.06.2021 framed under section 143(3) r.w.s 144C(13) the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. Grievances of the assessee read as under:

1. That after the omissions of clause (i) of section 92BA of the Act by Finance Act 2017, the AO has no jurisdiction to refer to TPO for determination of transfer pricing adjustment, i.e. ALP in respect of specified domestic transactions covered under section 40A(2) of the Income Tax Act and consequently the transfer pricing adjustment as made by TPO/ AO and sustained by the DRP is arbitrary, unjust and bad in law.

2. That the Transfer pricing adjustment amounting to Rs 14,92,534/- in relation to the purchases made from AE -M/s Delhi Brass and Metal Works Pvt Ltd amounting to Rs 1,18,92,158/- is arbitrary, unjust, without any comparable analysis and also contrary to the fact available on record .

3. That TPO and DRP failed to appreciate that Super productivity incentive amounting to Rs 235,01,88,528/- allowed to two promoter Directors namely Sh Harish Ahuja and Mrs Sarla Ahuja in terms of resolution dated 2nd September 2013 is on account of commercial expediency and are basically revenue neutral and consequently the disallowance of Rs 161,38,20,073/- out of managerial remuneration thereby inclusive therein the super productivity incentive is arbitrary, unjust, not based on comparable and bad in law.

4. That the disallowance of deduction u/s 80IA of the Act amounting to Rs 26,20,451/-, as sustained by DRP/ AO out of total deduction claimed by the Assessee of Rs 38,15,24,886/- in respect of steam

generating units based on the rates prescribed by the various State Electricity Regulations Authority for purchase of electricity from electricity generating units is arbitrary, unjust and against the provision of section 80IA(8) of the Act and ought to have allowed at the rates on which the State Electricity companies supplied to the consumers.

5. That the education cess, as paid the assessee during the year under consideration amounting to Rs. 4,10,96,638/- ought to have been allowed as expense u/s 37 of the Act by the lower Authorities as per Law.

6. That the assessee denies its liability to pay interest charged under section 234A, 234B and 234D of the Act."

3. Vide Ground No. 1, the assessee has challenged the jurisdiction of the Assessing Officer to refer to the Transfer Pricing Officer [TPO] for determination of transfer pricing adjustment.

4. Briefly stated, the facts of the case are that the assessee company is engaged in the business of manufacturing and export of ready-made garments and is also engaged in the business of generating electricity through windmill.

5. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee company has entered into various Specified Domestic Transactions (SDT) with its Associated Enterprises(AES). Accordingly, the case was referred to the TPO on 20.11.2018 under section 92CA of the Act. Challenge is in respect of this reference to the TPO. It is the say of the counsel that provisions of section 92BA of the Act was brought to the Statute Book by the Finance Act (No. 2) 2012 w.e.f 01.04.2013.

6. Later on, on account of difficulties faced by the taxpayers in application and implementation of provisions of Section 92BA of the Act in relation to SDT contemplated under section 40A(2) of the Act, the Legislature in its wisdom, omitted clause (i) of Section 92BA by the Finance (No 2) Act, 2017. Relying upon the decision of the Hon'ble Supreme Court in the case of Kolhapur Cane Sugar Works [2000] 2 SCC 536/AIR SC 811, the ld. counsel for the assessee vehemently stated that once the section is omitted from the statute book, result is that it has never existed, and based thereon, provisions under law cannot be continued.

7. The ld. counsel for the assessee further relied upon the decision of the Hon'ble Supreme Court in the case of General Finance Company 257 ITR 338 and concluded by saying that in light of these judicial decisions, clause (i) of section 92BA shall be deemed to be not on the statute since the beginning and the result would be that, on account of omission of clause (i) of section 92BA of the Finance Act 2017, transactions contemplated under section 40A(2) of the Act cannot be deemed to be SDT under section 92BA of the Act, and accordingly, no reference can be made by the AO to the TPO for the purpose of benchmarking of the transactions after enactment of Finance Act, 2017.

8. Strong reliance was placed on the decision of the coordinate bench Bangalore in the case of Texport Overseas Pvt Ltd ITA No. 1722/BANG/2017 order dated 22.12.2017, which was affirmed by the Hon'ble Karnataka High Court in ITA No. 392/2018 order dated 12.12.2019. It is the say of the ld. counsel for the assessee that subsequently, the Tribunal Bench at Delhi has followed the judgement of the Hon'ble Karnataka High Court in the case of SMR Automotive Systems India Ltd in ITA 6614/Del/2017 and Yorkn and Tech Pvt. Ltd 635/Delhi/2021.

9. Per contra, the ld. DR vehemently stated that in the decisions of the Hon'ble Karnataka High Court and various decisions of the coordinate bench of the Tribunal, one most important and relevant fact has not been brought before the court, which is that a saving clause was there in section 40A of the Act and, therefore, decisions relied upon by the ld. counsel for the assessee should not be considered.

10. It is the say of the ld. DR that even otherwise, the Memorandum explaining the provisions in Finance Bill, 2017 has specifically mentioned that these amendments will take effect from 01.04.2017 and will apply accordingly, in relation to A.Y 2017–18 and subsequent years.

11. We have given careful consideration to the rival submissions. It is true that provisions of section 92BA of the Act was brought to the statute book by Finance Act, 2012 and the same was introduced on the advice and observations of the Hon'ble Supreme Court in the case of Glaxco Smithline Asia Pvt. Ltd 195 taxmann.com 35, which is also clear from the Memorandum explaining the provisions of Finance Bill, 2012 which reads as under:

"*Transfer Pricing Regulations to apply to certain domestic transactions*

Section 40A of the Act empowers the Assessing Officer to disallow unreasonable expenditure incurred between related parties. Further, under Chapter VI-A and section 10AA, the Assessing Officer is empowered to re-compute the income (based on fair market value) of the undertaking to which profit linked deduction is provided if there are transactions with the related parties or other undertakings of the same entity. However, no specific method to determine reasonableness of expenditure or fair market value to re-compute the income in such related transactions is provided under these sections.

The Supreme Court in the case of CIT v. Glaxo SmithKline Asia (P) Ltd., in its order has, after examining the complications which arise in cases where fair market value is to be assigned to transactions between domestic related parties, suggested that the Ministry of Finance should consider appropriate provisions in law to make transfer pricing regulations applicable to such related party domestic transactions.

The application and extension of scope of transfer pricing regulations to domestic transactions would provide objectivity in determination of

income from domestic related party transactions and determination of reasonableness of expenditure between related domestic parties. It will create legally enforceable obligation on assessees to maintain proper documentation. However, extending the transfer pricing requirements to all domestic transactions will lead to increase in compliance burden on all assessees which may not be desirable.

Therefore, the transfer pricing regulations need to be extended to the transactions entered into by domestic related parties or by an undertaking with other undertakings of the same entity for the purposes of section 40A, Chapter VI-A and section 10AA. The concerns of administrative and compliance burden are addressed by restricting its applicability to the transactions, which exceed a monetary threshold of Rs.5 crores in aggregate during the year. In view of the circumstances which were present in the case before the Supreme Court, there is a need to expand the definition of related parties for purpose of section 40A to cover cases of companies which have the same parent company.

It is, therefore, proposed to amend the Act to provide applicability of similar pricing regulations (including procedural and penalty provisions) to transactions between related resident parties for the purposes of computation of income, disallowance of expenses, etc., as required under the provisions of sections 40A, 80-IA, 10AA, 80A, where

reference is made to section 80-IA, or to transactions as may be prescribed by the Board, if aggregate amount of all such domestic transactions exceeds Rs.5 crore in a year. It is further proposed to amend the meaning of related persons as provided in section 40A to include companies having the same holding company.

This amendment will take effect from 1st April 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.

12. The Hon'ble Supreme Court in the said judgement has observed as under:

"**2.** ..... However, we may clarify that proceedings are pending even today at various stages for different assessment years before the Authorities under the Income-tax Act. We express no opinion with regard to those proceedings.

**3.** However, we direct the Authorities to examine as to whether there is any loss of revenue in any of the assessment years in question. If, however, the Authorities find that the exercise is a revenue neutral exercise, then the matter may be decided, accordingly. We say no more in that regard.

**4.** However, a larger issue is involved in this case. The main issue which needs to be addressed is, whether Transfer Pricing Regulations should be limited to cross-border transactions or whether the Transfer Pricing Regulations be extended to domestic transactions. In the case of domestic transactions, the under-invoicing of sales and

over-invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage—

(*i*) If one of the related Companies is loss making and the other is profit making and profit is shifted to the loss making concern; and

(*ii*) If there are different rates for two related units (on account of different status, area based incentives, nature of activity, etc.) and if profit is diverted towards the unit on the lower side of tax arbitrage. For example, sale of goods or services from non-SEZ area (taxable division) to SEZ unit (non-taxable unit) at a price below the market price so that taxable division will have less profit taxable and non-taxable division will have a higher profit exemption.

**5**. All these complications arise in cases where fair market value is required to be assigned to the transactions between related parties in terms of section 40A(2) of the Income-tax Act, 1961 ('Act', for short). To get over this situation, we are of the view that the matter needs to be examined by Central Board of Direct Taxes (`CBDT', for short). We are informed that the matter has been examined by CBDT and it is of the view that amendments would be required to the provisions of the Act if such Transfer Pricing Regulations are required to be applied to domestic transactions between related parties under section 40A(2) of the Act."

13. An Identical issue came up before the co-ordinate Bench at Bangalore in the case of Texport Overseas Pvt Ltd IT [TP] [supra]. The relevant extract of the order of the co-ordinate bench reads as under:

> "10. In the instant case, undisputedly, by the Finance Act, 2017, clause (i) of section 92BA has been omitted w.e.f. 01.04.2017. Once this clause is omitted by subsequent amendment, it would be deemed that clause (i) was never been on the statute. While omitting the clause (i) of section 928A, nothing was specified whether the proceeding initiated or action taken on this continue. Therefore, the proceeding initiated or action taken under that clause would not survive at all. In this legal position, the cognizance taken by the AO under section 92B(i) and reference made to TPO under section 92CA is invalid and bad in law. Therefore, the consequential order passed by the TPO and DRP is also not sustainable in the eyes of law."

14. This Judgment of the co-ordinate bench has been affirmed by the Hon'ble Karnataka High Court in ITA No. 392/2018, which was followed by this Tribunal in the case of SMR Automotive Systems Private Limited in ITA No. 6614/DEL/2017. The relevant findings of this Tribunal read as under:

> 13. Before us referring to the additional ground raised the Counsel for the assessee vehemently stated that sub-section (r) of Section 92BA has been omitted from the statute and by virtue of the amendment this particular sub-clause shall be deemed not to be on the

statute since the beginning and, therefore, the assessment order deserves to be quashed. The Counsel referred to various judicial decisions in support of his contention. Per contra, the DR strongly supported the findings of the lower authorities and stated that there is no decision of the jurisdictional High Court. 14. We have given a thoughtful consideration to the orders of the authorities below. The undisputed fact is that as per sub-clause (r) of section 92 BA the assessee has undertaken the transaction which has exceeded the prescribed limit. It is also not in dispute that vide Finance Act,2017 w.e.f. 01.04.2017 the said sub-clause (r) of section 92BA has been omitted. We find that I.TA.No.6614/Del/2017/A.Y. 2013-14 the AO has made a reference u/s 92BA having observed that the assessee has entered into specific domestic transaction as the case is covered u/s 92 BA of the Act.

15. We find that an identical issue came up for adjudication before the coordinate bench, Bangalore in IT(TP)A No. 1722/2017. The relevant findings of the coordinate bench read as under:

"7. Having carefully examined the orders of authorities below in the light of rival submissions and relevant provisions and various judicial pronouncements, we find that by virtue of the insertion of section 92BA on the statute as per clause (i), any expenditure in respect of which payment has been made or is to be made to person referred to in clause (b) of sub section z of section 4oA exceeds the prescribed limit, it would be a specified domestic transaction for which AO is

required to make a reference to TPO under section 92CA of the Act for determination of the ALP. In the instant case, since the transaction exceeds the prescribed limit it becomes the specified domestic transaction for which reference was made by the AO to the TPO under section 92CL for determination of the ALP. Consequently, the TPO submitted a report which was objected to by the learned counsel for the assessee and filed a objection before the ORP. Having adjudicated the objections. the ORP has issued certain directions and consequently the AO passed an order. Subsequently, by Finance Act,

SMR Automotive Systems India... vs Addl. Cit, Special Range- 8, New ... on 3 June, 2021 or7 w.e.f . ou.o4.2o17, clause (i) of section 92BA was omitted from the statute. Now the question arises as to whether on account of omission of clause (i) from the statute, the proceedings already initiated or action taken under clause (i) becomes redundant or otiose. In this regard, our attention was invited to judgment of the Apex Court in the case of Kolhapur Cane sugar Works Ltd., (supra) in which the impact of omission of old rule ro and r OA was examined.

Having carefully examined the issue in the light of provisions of section 6 of the General Clauses Act, their Lordship has observed that in such a case, the court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been

deleted or omitted then such a I.T.A.No.6614/Del/ 2017 A.Y .2013-14 proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provisions in the statute or in the rule, the pending proceeding will lapse under rule under which the notice was issued or proceeding being omitted or deleted".

.

15. Respectfully following the decision of the Hon'ble Karnataka High Court and co-ordinate bench (supra), we hold that the reference to the TPO and consequent orders are bad in law. We, therefore, set aside this issue to the file of the Assessing Officer. The Assessing Officer is required to adjudicate the issue in accordance with law, after affording sufficient opportunity of being heard to the assessee.

16. Since we have restored the matter to the Assessing Officer, we find no justification to deal with other issues on merits. Ground No 1 is allowed and Ground Nos. 2 and 3 become otiose.

17. Before parting, the contention of the ld. DR has been addressed by the Hon'ble Supreme Court in the matter of Kolhapur Cane Sugar Works [supra] wherein the Hon'ble Supreme Court has observed:

> "Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is ] introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision."

18. These observations of the Hon'ble Supreme Court answer the issues raised by the LDR.

19. Coming to Ground No 4, which relates to the disallowance of deduction under section 80IA of the act, amounting to Rs. 26,20,451/- out of total deduction claimed by the assessee amounting to Rs. 38,15,24,886/-.

20. Representatives of both the sides were heard at length. Case records carefully perused.

21. The underlying facts in this issue are that the assessee is having 11 units all over India where boilers have been installed for captive consumption. On the generation of steam, which is considered as power, in view of various judgements of the Tribunal and Hon'ble High Courts as well as DRP, the assessee claimed deduction under section 80IA of the Act. For the purpose of claiming deduction under section 80IA of the Act, the assessee converted steam so generated into electrical units based on chartered engineer's certificate as per technical formula. On the basis of such conversion, total electrical units so generated were worked out. Quantum of steam generation and its conversion based on chartered engineer's formula, is as under:

| Unit | Steam generated (KG) m | Coverei on as per Charte r Eng. Formul a (2) | Electricity units (1)*<2M3) | Rate of electrid ty charged for Captive Consum | Total Sales of Electriaty Units (Turnover) as per Audited Finandal (3)*(4W5) | Expenses induding Fuel cost, Water Cost etc. (6) | Net Profit (5H6H7) | Depred-ation as per Company Act (8) | Depred-ation as per Income tax (9) | Net Profit for deduction u/s 80IA as per Certificate (7+8*9H10) |
|---|---|---|---|---|---|---|---|---|---|---|
| FI | 12,178,06 | 0.628 | 7,647,824 | 4.85 | 37,091,944 | 17,771,76 | 19320,181 | 548384 | 451,701 | 19,416,76 |
| 1 | 5,096,800 | 0.628 | 3,200,790 | 4.85 | 15323333 | 6397398 | 9,126,435 | 109398 | 75,648 | 9,160,185 |
| 7 | 23,651,05 | 0.628 | 14,852,863 | 4.85 | 72,036383 | 26,659,70 | 45,176,680 | 121,703 | 95304 | 45,40237S |
| 8 | 3,9- | 0.628 | 2,474320 | 4.85 | 12,000,452 | 4,804,653 | 7,195,799 | 448,653 | 368,012 | 7376,440 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 9 | 7,810,300 | 0.628 | 4,904^68 | 4.85 | 23,788,612 | 11,457361 | 12,331,251 | 276361 | 205,010 | 12,402,60 |
| 12 | 12,127,18 | 0.628 | 7315374 | 4.85 | 36,936,989 | 7,445329 | 19,491,160 | 541,829 | 354,748 | 19,678341 |
| 23 | 21,005,41 | 0.628 | 13,191,403 | 4.85 | 63,978302 | 27,497,19 | 36,481,111 | 1,991,19 | 1,464,972 | 37,007330 |
| 26 | 6,013,883 | 0.628 | 3,776,719 | 4.85 | 18,317,085 | 5328,978 | 12,488,107 | 327,978 | 241302 | 12374,78; |
| 27 | 2,493,120 | 0.628 | 1365,679 | 435 | 7393345 | 4,029,105 | 3364,440 | 613,105 | 451,074 | 3,726,471 |
| 28 | 3,186,300 | 0.628 | 2,000,996 | 435 | 9,704333 | 5,410,656 | 4394,177 | 400,656 | 294,773 | 4,400,060 |
| Shim | 92,165,70 | 0.628 | 57,880,060 | 4.85 | 280,718,289 | 124,062,9 | 156,655,36 | 25,798,6 | 20,247,13 | 162306371 |
| total | 189,667,8 | | 119,111395 \| | | 577,690,267 | 251365366 | 326324,70 | 31,17731 | 357302311 | 33335233. |

22. Under TP study, for the purpose of claiming deduction under section 80IA of the Act, the assessee had applied rate of Rs.4.85 per unit being rate on which assessee's wind mill units supplied electricity to Maharashtra State Electricity Board.

23. The TPO did not accept the claim of the assessee under section 80IA of the Act but the DRP accepted the eligibility of claim of the assessee under section 80IA of the Act. The DRP further observed as under:

> "The assessee has adopted the rate of electricity @ 4.85/- per unit. However, the TPO is directed to recomputed the deduction claimed u/s 80IA of the Act on account of production of steam, in the relevant Assessment Year by taking the same 5 comparables, as chosen by the TPO in the case of the assessee in Assessment Year 2017-18 and by taking the average power purchase cost [Rs./kwh] of these comparable companies in the relevant Assessment Year."

24. Before us, the ld. AR stated that the rate applied by the assessee is not correct. It is the say of the counsel that the rate charged by the electricity board to its consumers should be taken as rate for eligibility of deduction under section 80IA of the Act.

25. We are of the considered view that this contention of the ld. counsel for the assessee is correct. The counsel has applied the rate which it has charged to the electricity board whereas the rate should have been the rate charged by the electricity board to its consumers. We, therefore, set aside this issue to the file of the Assessing Officer. The assessee is directed to furnish the rates charged by the electricity board to its consumers and the Assessing Officer is directed to verify the same and decide the issue afresh. Ground No. 4 is allowed for statistical purposes.

26. Ground No. 5 and Additional Ground relate to the claim of education cess as deductible under section 37 of the Act.

27. This ground was not raised before the lower authorities. But the same is admitted in light of the ratio laid down by the Hon'ble Supreme Court in the case of NTPC 229 ITR 383.

28. This issue has been extensively considered by the Hon'ble High Court of Bombay in the case of Sesa Goa Ltd 117 Taxmann.com 96 wherein the Hon'ble High Court was seized, inter-alia with the following substantial question of law:

> "Whether on the facts and in the circumstances of the case and in law the Education Cess and Higher and Secondary Education Cess is allowable as a deduction in the year of payment."

29. The Hon'ble High Court answered the question as under:

> "15. The substantial question of law No. (iir) in Tax Appeal No. 17 of 2013 and the only substantial question of law in Tax Appeal No. l8 of 2013 is one and the same. namely,' whether Education Cess and Higher and Secondary Education Cess, collectively referred to as "cess" is allowable as a deduction in the year of its payment ?'.
>
> 16. The aforesaid question arises in the context of provisions of Section 40(a)(fi) which inter alia provides that notwithstanding

anything to the contrary in sections 30 to 38 of the [T Act, the following amounts shall not be deducted in computing the income chargeable under the head" Profits and gains of business or profession", -

in the case of any assessee - any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

Explanation 1.-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the lndian income-tax payable under section 91.1

Explanation 2.-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;l

(a)

(a

(ib)

(rc)

(,,)

2.LL

17. Therefore, the question which arises for determination is whether the expression "any rate or tax levied' as it appears in section a0(a)(ii) of the IT Act includes "cess". The Appellant - Assessee contends that the expression does not include "cess" and therefore, the amounts paid towards "cess" are liable to be deducted in computing the income chargeable under the head "profits and gains of business or pro{ession'1 However, the Respondent - Revenue contends that "cess" is also included in the scope and import of the expression "ony rate or tax levied' and consequently, the amounts paid towards the"' cess" be not liable for deduction in computing the income chargeable under the head "profits and gains of bu-sine s s or profession".

t8. In relation to taxing statute, certain principles of interpretation are quite well settled. ln New Shorrock -Spinning and .l{fg Co. Lrd. v. Raval, [959] 37 ITR al (.Bom.), it is held that one safe and infallible principle. which is of guidance in these matters- is to read the sords through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done lndeed, in such a case the task of interpretation can hardly be said to arise : Absolutt sententia expositore non indiget. The language used by the Legislature best declares its tntention and must be accepted as decisive of it.

19. Besides. when it comes to interpretation of the IT Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit

20. In a taxing Act one has to look merely at what is clearly said. There is. no room for any intendment. There is no equity about a tax. There is no presumption as to a tan. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature [See C,i'Iv. Radhe Developers L20l2J 17 ta:gnann.com 156/204 Ta,xman 543/341 ITR 403 (Guj.). One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions lSee Goodyear v. State of Haryana U99l] 188 ITR402(SC)1. i

21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See IGS Tiber v. CIT [998] 233 ITR 207 I Ll997l 92 Taxann 268 (Mad.)l.

22. Applying the aforesaid principles, we find that the legislature, in Section ail@)(ii) has provided that "any rate or tax levied' on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference to any 'cess. Obviously therefore, there is no scope to accept Ms. Linhares's contention that 'cess" being in the nature of a "To x" is equally not deductable in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in section a0(a)(ir) of the IT Act.

23.If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess', then, the legislature could have easily included reference to "cess" in clause (if) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".

24. The legislative history bears out that the Income Ta x Bill, 1 96 I , as introduced in the Parliament, had Section a0@)(ii) which read as follows :

"(d) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains"

25. However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word "cess" from the aforesaid clause from the Income-tax Bill, 1961. The effect of the omission of the word "cess" is that only an-v- rate or tax levied on the profits or gains of any business or profession are to be deducted in computing it income chargeable under the head "pro/its and gains of business or profession". Since the deletion of expression "cess" from the lncome-tox Bill. 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a) of IT Act and that too, under the guise of interpretation of taxing statute.

26.ln fact" in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No. 91158166-lTJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

"Interpretation of provision of Section 40(a)(fi) of IT Act, 1961 - Clarification regarding.-

"Recently a case has come to the notice of the Board where the Income-tax Officer has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of section lb(4) of the Old Act and Section a0(aXrr) of the new Act.

2. The view of the lncome-tax Officer is not correct. Clause a$@)(ii) of the Income-tax Bill, l96l as introduced in the Parliament stood as under:-

"(fi) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains".

When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.

3. The Board desire that the changed position may please be brought to the notice of all the Income-tax Officers so that further litigation on this account may be avoided. Board's F. No. 9l I 58166-IT( I 9), dated I 8-5-1967.I

27.The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression "cess" ought not to be read or included in the expression "any rate or tM levied' as appearing in section a0@)(ti) of the IT Act.

28. In the lncome-tax Act, section l0(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section ail@)(ii) of the IT Act, 1961 the expression "cess" is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income-tax Bill, 196l which was introduced in the Parliament. However, the Select Committee recommended the omission of expression "cess" and consequently, this expression finds no place in the final text of the provision in Section a$@)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(fi) does not include, "cess" and consequently, "cess" whenever paid in relation to business, is allowable as deductable expenditure.

29.In Kanga and Palllivala's "The Low and Practice of Income Tax '(Tenth Edition) several decisions have been analyzed in the context of provisions of Section a0(a)(fi) of the IT Act, 196l . There is reference to the decision of Privy Council in CIT v. Gurupada Dutta [1946] 14 ITR 100 (PC), where a union rate was imposed under a Village Self Government Act upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in Jaipuria Samla Amalgamated Collieries Ltd. v. CIT 1971 182 ITR 580] that the

expression 'profits or gains of any business or profession' has reference only to profits and. gains as determined in accordance with Section 29 of this Act and that any' rate or tax levied upon profits calculated in a manner other than that provided by that section could not be disallowed under this sub-clause. Similarly' this sub-clause is inapplicable. and a deduction should be allowed. where a tax is imposed b.'- a district board on business with reference to estimated income or b1' a municipality with reference to gross income'. Besides, unlike Section lO(a) of the 1922 Act. This sub-clause does not refer to cess and therefore. 'cess' even if levied upon or calculated on the basis of business profits ma1' be allowed in computing such profits under this Act.

30. The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income-tax Appeal No. 5212018 decided on 3lst July, 2018 Chambal Fertilisers and Chemicals Ltd. v. CIT, by reference to the aforesaid CBDT Circular dated l8th Ma-v-. 1967 has held that the ITAT erred in holding that the "education cess" is a disallowable expenditure under section a0(a)(if) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. IvIr. Ramani, learned Senior Advocate submitted that his research did not suggest that an1' appeal was instituted by the Revenue against this decision, which is directly on the point.

31. Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and

Chemicals Ltd.(supra)was followed and it was held that the amounts paid by the Assessee towards the education cess were liable for deduction in computing the income chargeable under the head of "profits and gains of business or profession". They are as follows :-

(,) Dy. CIT v. Peerless General Finance and investment and Co. Ltd. [T Appeal No. 1469 and 147olKoll2019 decided on 5-12-2019 by the ITAT, Calcutta; (,0 Dy. CIT v. Graphite lndia Ltd [T Appeal No. 472 and 474 Co. No. 64 and 66/Kol/2018 dated on22-11-2019)by the ITAT, Calcutta;

(ii} Dy. CIT v. Bajaj Allianz General insurance [T Appeal No. 1111 and 1112IPUN 12017 dated on 25-7-2019) by the ITAT, Pune.

32. Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the

33. The ITAT, in the impugned judgment and order, has reasoned that since "cess" is collected as a part of the income ta< and fringe benefit tax, therefore, such 'cess is to be construed as "tax". According to us, there is no scope for such implications, when construing a taxing statute. Even, though, "cesss" may be collected as a part of income

tax, that does not render such "cess", either rate or tax, which cannot be deducted in terms of the provisions in Section a0(a)(ir) of the IT Act. The mode of collection, is really not determinative in such matters.

34. Ms. Linhares, has relied upon (Unicorn Industries v. (Union of India [20I9] I I 2 taxmann.com I 27 (SC) in support of her contention that "cess" is nothing but "rG" and therefore, there is no question of deduction of amounts paid towards "cess" when it comes to computation of income chargeable under the head profits
or gains of any business or profession.

35. The issue involved in (Unicorn Industries (supra) was not in the context of provisions in Section " +01411;4 of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)'on it could be construed as" duty of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the industrial Growth Centre or other specified a:eas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of exercise" and consequently, the amounts paid towards such cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra).

36. The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as' ury of excise" when it came to construing exemption Notification. Based upon this. Shri. Ramani contends that similarly amounts paid by the Appellant - Assessee towards the 'cess" can never be regarded as the amounts paid towards the "rar" so as to attract provisions of Section a0(nXrr) of the IT Act. All that remain is that the issue involved in Unicorn Industries (supra) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries (supra) can be of no assistance to the Respondent - Revenue in the present matters.

37. Ms. Linhares. learned Standing Counsel for the Revenue however submitted that the Appellant -Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Suprcme Courl in Goetze (lndia) Ltd. y. C/f [2006J 284 ITR . 3231157 taxman I (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant - Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.

38. Although, it is true that the Appellant - Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the Appellant - Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant - Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant - Assessee, both before the Commissioner (Appeals) as well as the ITAT.

39. In CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. L20127 349 ITR 3361208 Taxman 498123 tanmann.com 23 (Bom), one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient power to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd. v. CII[93] l99ITR 351/66 Taxman 27 (Bom.) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The

Appellate Authorities may confirm. reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tm liability of the Assessee in accordance with law.

40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze India Ltd. (supra),the . Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers Shareholders (P.) Ltd. (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return. the Appellant - Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the lTAT, before whom such deduction as specifically' claimed was duty bound to consider such

claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze India Ltd. (supra).

42. For all the aforesaid reasons. se hold that the substantial question of law No. (iii) in Tax Appeal No. 17 of2013 and the sole substantial question of law in Tax Appeal No. l8 of20l3 is also required to be answered in favour of the Appellant - Assessee and against the Respondent-Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification.

30. The ld. DR has placed strong reliance on the decision of the co-ordinate bench Calcutta in the case of Kanodia Chemicals ITA No. 2184/KOL/2018 wherein the bench has drawn support from the decision of the Hon'ble Supreme Court in the case of K. Srinivasan 1972 AIR 491.

31. We have given thoughtful consideration to the decisions relied upon by the ld. DR. We find that the co-ordinate bench has followed the decision of the Hon'ble Supreme Court in the case of K Srinivasan [supra]. However, the issue before the Hon'ble Supreme Court was whether the surcharge is part of tax or not. Whereas the issue before the Hon'ble Bombay High Court in the case of Sesa Goa was whether education cess is

allowable as expenditure or not. Therefore, the decision of the Hon'ble Bombay High Court is directly on the claim of the assessee and respectfully following the same, we direct the Assessing Officer to allow the claim of deduction in respect of education cess paid by the assessee. Ground number 5 and additional ground is allowed.

32. In the result, appeal of the assessee in ITA No. 843/DEL/2021is allowed in part for statistical purposes.

The order is pronounced in the open court on 17.01.2022 in the presence of both the representatives.

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **[**SAKTIJIT DEY**]** | **[N.K. BILLAIYA]** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Dated: 17th January 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

| | |
|---|---|
| Date of dictation | |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr.PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr.PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |